

**SANITIZED DEC. 05-023 C – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION 8/01/05 – ISSUED 8/15/05**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- CORPORATE OFFICER PERSONALLY LIABLE -- Petitioner who became corporate secretary at the inception of the business (and later its employee-bookkeeper, and even later, its independent-contractor bookkeeper) and whose authority it was to file consumers' sales and service tax returns and remit the required taxes is personally liable for the failure of the corporation to properly file returns and remit taxes as required by law. W. Va. Code § 11-15-17 [1978].

CONSUMERS' SALES AND SERVICE TAX -- PERSONAL LIABILITY IS NOT SHIFTED OR FORGIVEN BECAUSE SUPERIOR HAD FINAL AUTHORITY OR BECAUSE OTHERS ALSO HAD AUTHORITY TO FILE TAX RETURNS -- Personal liability which attached to corporate officer for failure of the corporation to comply with consumers' sales and service tax statutes may not be shifted entirely to Petitioner's supervisors, even if they had final authority to pay same or could also file such returns. *See* W. Va. Code St. R. § 110-15-4a.6.3 (July 15, 1993).

CONSUMERS' SALES AND SERVICE TAX – STATUTE OF LIMITATION FOR OFFICER'S LIABILITY ASSESSMENTS – The statute of limitation for issuing an assessment of consumers' sales and service tax against an officer of a corporation or association is governed by W. Va. Code St. R. § 110-15-4a.7.1 (July 15, 1993); under that legislatively reviewed and approved regulation an assessment against an officer of a corporation or association is considered to be a proceeding for the **collection** of the tax liability of the corporation or association and, consequently, the statute of limitation is set forth in W. Va. Code § 11-10-16(a) [1993].

FINAL DECISION

On November 15, 2004, the Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner, an individual as an officer of the corporation. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the

periods of February, 1999 through September, 2000, and May, 2002; October, 2002 through May 2003; and July, 2003 through December, 2003; for tax, interest through November 15, 2004, and additions to tax, for a total assessed tax liability. Written notice of this consumers' sales and service tax assessment was served on the Petitioner.

Thereafter, by mail postmarked January 11, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

In response to a query made by Petitioner's counsel at hearing, Respondent's counsel submitted to this tribunal a copy of the consumers' sales and service tax assessment issued against the corporation, dated December 8, 2000 for the period of February 1, 1999 through September 30, 2000, which had become final.

FINDINGS OF FACT

1. During the periods involved in the assessment the Petitioner was listed in the official corporate records in the West Virginia Secretary of State's Office as the Secretary of the corporation from the inception of the business in 1999.

2. On page 16 of the hearing transcript Petitioner testified that he has stock in the corporation; however, on page 18 of said transcript, Petitioner testified that he had no such stock.

3. Petitioner began employment with the corporation in February, 1999 as a bartender, but when the corporation needed someone to take care of the books, he offered his services as a bookkeeper in June or July of 2000.

4. Some three (3) or four (4) months after first performing his bookkeeping services as an employee, Petitioner began to perform same as an independent contractor.

5. Petitioner's bookkeeping duties were interrupted, including check-writing approval, in 2002 for a period of one (1) year because of a heart attack and at other times when Petitioner quit for a period of months because of frustration with the way in which the corporation was run, including filing sales tax returns without remittances.

6. Petitioner testified that he was aware as early as June or July of 2000 that the corporation was collecting consumers' sales and service tax but not remitting it to the State of West Virginia.

7. It is the crux of Petitioner's testimony that, although he was the primary person to make sure that the sales tax returns were prepared and filed, final approval and authority rested with the corporation's president.

8. Applying the relevant provisions of the consumers' sales and service tax regulations, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that the Petitioner was the secretary of the corporation from its inception and whose responsibilities included preparing and filing consumers' sales and service tax returns on behalf of the corporation.

DISCUSSION

The first issue with respect to the consumers' sales and service tax assessment is whether the Petitioner is one of the corporate officers who is personally responsible for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the periods involved in the assessment.

For consumers' sales and service tax purposes, W. Va. Code § 11-15-17 [1978] provides that "[i]f the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation" with respect to that tax.

In this case Petitioner was the corporate secretary since 1999 whose duties included preparing and filing consumers' sales and service tax returns along with the required remittance of said taxes.

The Petitioner, as far back as the year 2000, knew that he was filing no-remittance consumers' sales and service tax returns but took no action to prevent same. He testified that he would quit from time to time; however he continued the deception for years.

It is of no consequence that the Petitioner was unable to file the no-remittance returns while on medical leave or when he quit bookkeeping from time to time, because he remained the corporate secretary at all times.

Accordingly, Petitioner is personally liable as an officer of the corporation for the default on the part of the corporation with respect to the payment of consumers' sales and service tax.

It is noted that, because Petitioner, as the corporate secretary, had the authority to file consumers' sales and service tax returns on behalf of the corporation, the rules imposing personal liability set forth in State ex rel. Haden v. Calco Awning & Window Corp., 153 W. Va. 524, 170 S.E.2d 362 (1969), have been satisfied in that imposition of personal liability here is not "unreasonable, arbitrary or capricious."

The second issue presented for determination is whether the Petitioner's personal liability in this case is excused because either (a) the corporation's president had the final say or ultimate authority concerning the filing of returns and payment of taxes due; or (b) that others who had authority also filed returns in his absences.

In his brief Petitioner's counsel opines, "Thus, it was not as an officer, but as its sometimes independent contract bookkeeper, that the Petitioner ever had the subservient authority to sign checks, to prepare sales tax returns and to remit taxes due for the corporation."

Petitioner's argument is without merit, because if valid, one could escape as the "responsible" officer by merely claiming that superiors have the final power or that others had the same powers; W. Va. Code St. R. § 110-15-4a.6.3 (July 15, 1993) (legislative regulation), in contrast, imposes joint and several liability in these situations.

Accordingly, it is further determined that Petitioner remains personally liable, jointly and severally, as an officer of the defaulting corporation.

The third issue for determination is whether the general three-year statute of limitations for issuing assessments, set forth in W. Va. Code § 11-10-15(a) [1986], bars the Respondent from issuing an assessment against the Petitioner for periods prior to November, 2001 (more than three years prior to the assessment against the Petitioner)

W. Va. Code St. R. § 110-15-4a.7.1 (July 15, 1993) provides as follows:

An assessment against officers is considered to be a proceeding for the collection of the tax liability of the corporation or association. If the liability of the corporation or association is determined to be due by an assessment which has become final, an assessment against an officer must be made within five years [or, apparently, within ten (10) years, under the current, 1993 amendment to W. Va. Code § 11-10-16(a)] after the assessment against the corporation or association has become final. If the liability of the corporation is determined to be due by methods provided by law other than an assessment, an assessment against an officer must be made within five years [now ten years] after the date on which the corporation or association filed its annual return, or if no annual return is required, five years [now ten years] after the latest periodical return required to be filed in any year is filed.

Accordingly, under this legislatively reviewed and approved regulation, the collection-proceeding-type assessment issued here against the Petitioner as a corporate officer was timely issued with respect to all periods included in this assessment.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. The Petitioner is one of the corporate officers or persons who is personally liable for all of the unpaid consumers' sales and service tax liability of the corporation. W. Va. Code § 11-15-17 [1978].

2. Personal liability which attached to corporate officer for failure of the corporation to comply with consumers' sales and service tax statutes may not be shifted entirely to Petitioner's supervisors, even if they had final authority to pay same or could also file such returns. *See* W. Va. Code St. R. § 110-15-4a.6.3 (July 15, 1993).

3. The statute of limitation for issuing an assessment of consumers' sales and service tax against an officer of a corporation or association is governed by W. Va. Code

St. R. § 110-15-4a.7.1 (July 15, 1993); under that legislatively reviewed and approved regulation an assessment against an officer of a corporation or association is considered to be a proceeding for the **collection** of the tax liability of the corporation or association and, consequently, the statute of limitation is set forth in W. Va. Code § 11-10-16(a) [1993].

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the periods of February, 1999 through September, 2000, and May, 2002; October, 2002, through May, 2003; and July, 2003 through December, 2003; for tax, interest through November 15, 2004, and additions to tax, for a total assessed tax liability, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers' sales and service tax assessment until this liability is fully paid.